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10 **UNITED STATES DISTRICT COURT**

11 **CENTRAL DISTRICT OF CALIFORNIA**

12 KENNY DORSEY, individually and on
13 behalf of all others similarly situated
14 and the general public,

15 Plaintiff,

16 v.

17 ROCKHARD LABORATORIES, LLC,
18 a Georgia Limited Liability Company;
19 et al.,

20 Defendants.

Case No: 2:13-cv-07557-DDP (RZx)
CLASS ACTION

21 **PLAINTIFF'S OPPOSITION TO**
22 **DEFENDANT ROCKHARD**
23 **LABORATORIES, LLC'S AND**
24 **ROCKHARD LABORATORIES**
25 **HOLDINGS, LLC'S MOTION TO**
26 **DISMISS, MOTION TO STRIKE, AND**
27 **MOTION FOR MORE DEFINITE**
28 **STATEMENT REGARDING THE**
SECOND AMENDED COMPLAINT

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11 **Rules**

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1 Plaintiff Kenny Dorsey, on behalf of himself, all others similarly situated, and the
 2 general public, opposes Defendants RockHard Laboratories, LLC's and RockHard
 3 Laboratories Holdings, LLC's Motion to Dismiss, Motion to Strike and Motion for More
 4 Definite Statement. The facts alleged, taken as true for purposes of this Motion, set forth
 5 plausible claims. The Court should therefore deny the Motion in its entirety. In the
 6 alternative, the Court should grant Plaintiff leave to amend under the liberal pleading
 7 standard set forth in Federal Rule of Civil Procedure 15(a).

8 **I. FACTUAL AND PROCEDURAL BACKGROUND**

9 On October 11, 2013, Plaintiff Kenny Dorsey filed the initial Complaint in this
 10 matter, alleging a putative class action against Defendants RockHard Laboratories, LLC
 11 and RockHard Laboratories Holdings, LLC, the manufacturers, marketers and sellers of
 12 the male sexual enhancement product called RockHard Weekend (the Product or RHW)
 13 for violation of California's consumer fraud statutes. *See* Dkt. # 1. On February 28,
 14 2014, Plaintiff filed his First Amended Complaint (FAC). *See* Dkt. # 13. Defendants did
 15 not appear until after the FAC was filed. *See* Dkt. # 18. The parties stipulated to the
 16 filing of the Second Amended Complaint (SAC) on June 10, 2014. *See* Dkt. # 30 & 32.
 17 The SAC contains allegations arising under the Unfair Competition Law (UCL), Cal.
 18 Bus. & Prof. Code §§ 17200 *et seq.*, False Advertising Law (FAL), Cal. Bus. & Prof.
 19 Code §§ 17500 *et seq.*, Consumer Legal Remedies Act (CLRA), Cal. Civ. Code §§ 1750
 20 *et seq.*, and the Magnuson-Moss Warranty Act (MMWA), 15 U.S.C. §§ 2301 *et seq.* *See*
 21 ¶¶ 113-142; 154-163.¹ The SAC also alleges Breach of Express Warranty and Breach of
 22 the Implied Warranty of Merchantability. ¶¶ 143-153.

23 **II. STANDARD OF REVIEW**

24 A complaint must set forth "a short and plain statement of the claim showing that
 25 the pleader is entitled to relief," so as to "give the defendant fair notice of what the . . .
 26 claim is and grounds upon which it rests." Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v.*
 27

28 ¹ All citations to the SAC are designated as ¶ ____.

1 *Twombly*, 550 U.S. 544, 555 (2007) (“*Twombly*”) (quoting *Conley v. Gibson*, 355 U. S.
 2 41, 47 (1957)). “To survive a motion to dismiss, a complaint must contain sufficient
 3 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
 4 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“*Iqbal*”) (quoting *Twombly*, 550 U.S. at
 5 570). Where the facts pleaded “allow[] the court to draw the reasonable inference that
 6 the defendant is liable for the misconduct alleged,” the claims are facially plausible. *Id.*
 7 at 678 (citing *Twombly*, 550 U.S at 555). Claims are also facially plausible if the pleader
 8 alleges “enough fact to raise a reasonable expectation that discovery will reveal
 9 evidence” of the plaintiff’s claim. *Twombly*, 550 U.S. at 556.

10 A Rule 12(b)(6) motion only tests the sufficiency of the complaint and not any
 11 extrinsic evidence. *Paulsen v. CNF, Inc.*, 391 F. Supp. 2d 804, 807 (N.D. Cal. 2005).
 12 The court must “accept all factual allegations in the complaint as true and construe the
 13 pleadings in the light most favorable to the nonmoving party.” *Knievel v. ESPN*, 393
 14 F.3d 1068, 1072 (9th Cir. 2005). Motions to dismiss under Rule 12(b)(6) are “viewed
 15 with disfavor” and “rarely granted.” *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249
 16 (9th Cir. 1997) (citation omitted).

17 III. ARGUMENT

18 Construing all facts in the light most favorable to the non-moving party, this Court
 19 should deny Defendant’s Motion to Dismiss the SAC for the following reasons.

20 A. All of Plaintiff’s Claims Sounding in Fraud are Pleaded with Particularity

21 A complaint is sufficiently plausible when its facts rise “above mere speculative
 22 level.” *Twombly*, 550 U.S. at 570. Claims sounding in fraud or mistake are subject to the
 23 heightened pleading requirements of Federal Rule of Civil Procedure 9(b), which requires
 24 that a plaintiff alleging fraud “must state with particularity the circumstances constituting
 25 fraud.” Fed. R. Civ. P. 9(b); *see also Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th
 26 Cir. 2009). To satisfy the heightened standard under Rule 9(b), the allegations must be
 27 “specific enough to give defendants notice of the particular misconduct which is alleged
 28 to constitute the fraud charged so that they can defend against the charge and not just

1 deny that they have done anything wrong.” *Semegen v. Weidner*, 780 F.2d 727, 731 (9th
 2 Cir. 1985). Thus, claims sounding in fraud must allege “an account of the ‘time, place,
 3 and specific content of the false representations as well as the identities of the parties to
 4 the misrepresentations.”” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (per
 5 curiam) (internal quotation marks omitted).

6 “When claims under the CLRA, UCL, and FAL are based on a manufacturer's
 7 alleged misrepresentations about a product's characteristics, those claims sound in fraud
 8 and Rule 9(b) applies.” *Janney v. Mills*, 944 F. Supp. 2d 806, 817 (N.D. Cal. 2013)
 9 (internal citations omitted). “A plaintiff may choose not to allege a unified course of
 10 fraudulent conduct in support of a claim, but rather to allege some fraudulent and some
 11 non-fraudulent conduct.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104 (9th Cir.
 12 2003). “In such cases, only the allegations of fraud are subject to Rule 9(b)'s heightened
 13 pleading requirements.” *Id.* “The rule does not require that allegations supporting a
 14 claim be stated with particularity when those allegations describe non-fraudulent
 15 conduct.” *Id.* Here, the gravamen of Plaintiff's fraudulent CLRA, UCL and FAL claims
 16 centers upon Defendants' marketing, promotion and sale of the Product as false and
 17 deceptive to a reasonable consumer. ¶¶ 15-70. The SAC alleges sufficient facts as to
 18 “who, what, when, and where,” so that Defendants are apprised of the basis of Plaintiff's
 19 fraud claims and can defend against them. *See Tarmann v. State Farm Mut. Auto. Ins.*
 20 *Co.*, 2 Cal. App. 4th 153, 157 (1991).

21 First, the SAC identifies the parties, the specific Product Plaintiff purchased, when
 22 Plaintiff purchased it, where he purchased it, and the cost of the Product. ¶ 25. Second,
 23 the SAC incorporates the advertising Plaintiff saw and relied upon, states when he was
 24 exposed to Defendants' advertising, and identifies specific false and deceptive labeling
 25 claims with quotation marks for the Product purchased. *Id.*; ¶ 26 & Ex. A.

26 Third, the SAC specifies why Defendants' advertising is likely to deceive a
 27 reasonable consumer, even if true. ¶¶ 3, 41 (“None of the ingredients in any iteration of
 28 [the Product] . . . will enhance male sexual performance”); ¶¶ 23, 35-36 (claims that

1 Product is “all natural” are misleading and false because the Product contains ingredients
 2 that are synthetic, chemically reduced and/or have carcinogenic properties); ¶¶ 39-41
 3 (claims that Product is “Doctor Tested” and “Doctor Approved” are false and deceptive
 4 because “Defendants have not and cannot cite to any research studies or unsolicited
 5 endorsements of RHW by medical doctors, nor is RHW used in clinical settings for the
 6 treatment of male impotence or any other condition.”); ¶¶ 24, 43-47 (Product is
 7 unlawfully labeled, represented, and/or promoted for use as over-the-counter aphrodisiac
 8 in violation of 21 C.F.R. § 310.528, and such labeling claims have not been approved by
 9 the FDA prior to RHW being marketed to the public); ¶¶ 28-47 (setting forth detailed
 10 reasons why advertising is false or deceptive, with citation to authority).

11 Fourth, and most importantly, the SAC includes the Product’s challenged labeling
 12 at Exhibit A. *See Zupnik v. Tropicana Prods., Inc.*, CV 09-6130 DSF RZX, 2010 WL
 13 6090604, at *2 (C.D. Cal. Feb. 1, 2010) (finding complaint, detailing representations and
 14 why they were false, including attaching the labels, complied with Rule 9(b)). The
 15 “primary evidence in a false advertising case is the advertising itself.” *Williams v.*
 16 *Gerber Prods. Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (citation omitted).

17 In addition to these allegations, the SAC further states “Defendants primarily
 18 advertise and promote RHW through uniform labeling claims” ¶ 17, and that the “Product
 19 is also the subject of an extensive and comprehensive marketing campaign in various
 20 media including the internet.” ¶ 18. As such, the Product’s challenged claims are
 21 identical, regardless of the advertising medium deployed by Defendants in
 22 communicating their sales message to Plaintiff and other consumers. Accordingly, any
 23 argument Defendants have with respect to Plaintiff’s failure to plead specific facts
 24 regarding what he saw or relied on in purchasing the Product is unavailing. *See In re*
 25 *Tobacco II Cases*, 46 Cal. 4th 298, 328 (2009) (under the reality of advertising
 26 psychology, a reasonable consumer will not recall every detail of an advertising
 27 campaign but will nonetheless be influenced by it, such as “where...a plaintiff alleges
 28 exposure to a long-term advertising campaign, [in which case,] the plaintiff is not

1 required to plead with an unrealistic degree of specificity that the plaintiff relied on
 2 particular advertisements or statements.”). In sum, the allegations in the SAC are
 3 plausible, and are pleaded with sufficient particularity.²

4 **B. Plaintiff has Standing to Allege All Causes of Action in the SAC**

5 Article III standing requires that: (1) the party invoking federal jurisdiction has
 6 suffered some actual or threatened injury; (2) the injury must be fairly traceable to the
 7 challenged conduct; and (3) a favorable decision would likely redress or prevent the
 8 injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Mazza v. Am.*
 9 *Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012) (citing U.S. Const., art. III).
 10 (internal citations omitted). Although Defendants claim to be raising Article III standing,
 11 their Motion actually challenges both statutory and constitutional standing. *See Morrison*
 12 *v. TriVita, Inc.*, 12-CV-1387 BEN BLM, 2013 WL 1148070, at *2-3 (S.D. Cal. Mar. 19,
 13 2013) (discussing difference). But Defendants are wrong on all counts.

14 *i. Plaintiff has pleaded reliance and injury in fact to establish standing*

15 “In order to assert a claim under the UCL or FAL, a person must have suffered
 16 injury in fact and have lost money or property as a result of such unfair competition.” *In*
 17 *re Ferrero Litig.*, 794 F. Supp. 2d 1107, 1111-12 (S.D. Cal. 2011) (citing Cal. Bus. &
 18 Prof. Code §§ 17204, 17535). “Therefore, actual reliance is required to have standing to

20 ² Defendants’ authority further supports this point and does not, as Defendants contend,
 21 stand for the proposition that Plaintiff must plead his “subjective understanding” of the
 22 challenged labeling claims “at the time he allegedly purchased the product, how those
 23 subjective understandings were shared by the reasonable consumer, and how his
 24 expectations were frustrated.” Mot. at 4:25-28 to 5:1. *See Kane v. Chobani, Inc.*, 12-CV-
 25 02425-LHK, 2013 WL 5289253, at *4 (N.D. Cal. Sept. 19, 2013) (“claims sounding in
 26 fraud must allege an account of the time, place, and specific content of the false
 27 representations as well as the identities of the parties to the misrepresentations. . . [and]
 28 must set forth what is false or misleading about a statement, and why it is false.”); *Samet*
v. Procter & Gamble Co., 5:12-CV-01891 PSG, 2013 WL 3124647, at *8 (N.D. Cal.
 June 18, 2013) (same); *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d
 1047, 1055 (9th Cir. 2011) (same).

1 sue under the UCL or FAL.” *Id.* (citing *Kwikset Corp. v. Sup. Ct.*, 51 Cal. 4th 310, 326–
 2 27 (2011) and *In re Tobacco II*, 46 Cal. 4th at 306 (plaintiff “proceeding on a claim of
 3 misrepresentation as the basis of his or her UCL action must demonstrate actual reliance
 4 on the allegedly deceptive or misleading statements, in accordance with well-settled
 5 principles regarding the element of reliance in ordinary fraud actions.”)). “In addition,
 6 actual reliance is required to have standing to sue under the CLRA.” *Id.* at 1110.

7 Here, Plaintiff has sufficiently alleged constitutional and statutory standing
 8 because he reviewed the Product’s packaging claims and would not have purchased the
 9 Product but for its advertising. ¶¶ 25-26, 53-55, 57-59, 65-68. Plaintiff also alleges why
 10 the advertising is false or deceptive. ¶¶ 21-24, 28-52. The Ninth Circuit has ruled this is
 11 sufficient to establish standing. *Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1105 (9th Cir.
 12 2013) (finding that where a plaintiff “alleges that he would not have purchased the goods
 13 in question absent this misrepresentation,” economic injury for standing is present).

14 Defendants also claim that Plaintiff must demonstrate he was allegedly deceived,
 15 and either paid a premium for the product, or would have purchased an alternate product
 16 to establish injury in fact. Mot. 7:9-15. But this is not the applicable standard. As the
 17 Ninth Circuit recently made clear, all that is necessary for statutory standing under the
 18 consumer fraud statutes in this case is to allege that but for the misrepresentations, the
 19 plaintiff would not have purchased the product. *Hinojos*, 718 F.3d at 1105. While
 20 *Hinojos* concerned a false pricing scheme, for standing, a plaintiff need only allege how
 21 they were harmed, but need not plead a specific measure of their loss. *Id.* (citing *Kwikset*
 22 *Corp.*, 51 Cal. 4th at 328, n.15 (“Because the issue here is only the threshold matter of
 23 standing, not whether and how much to award in restitution, a specific measure of the
 24 amount of [the alleged] loss is not required.”)). Here, Plaintiff specifically pleaded how
 25 he was harmed, through purchase of a product that was falsely or deceptively advertised,
 26 and that he suffered economic loss because he would not have bought the Product but for
 27 its advertising claims. ¶¶ 25-26, 52, 57, 60, 123, 133, 138. This is sufficient for statutory
 28 and constitutional standing. *See id.*; *Hinojos*, 718 F.3d at 1105; *Mazza*, 666 F.3d at 595

1 (“To the extent that class members were relieved of their money by Honda’s deceptive
 2 conduct—as Plaintiffs allege—they have suffered an ‘injury in fact.’”) (referring to Art.
 3 III standing).³

4 ii. *At class certification, Plaintiff may permissibly assert claims on behalf of*
 5 *persons who purchased products with substantially similar advertising*

6 Defendants ask the Court to determine a class issue – whether Plaintiff can represent
 7 purchasers of other iterations of the Product— even before a class certification motion has
 8 been made. Defendants’ argument is improper. Whether a named plaintiff has standing
 9 to represent purchasers of other products is an issue reserved for class certification, and
 10 should not be decided on a motion to dismiss. *See, e.g., Bruno v. Quten Research Inst.,*
 11 *LLC*, 280 F.R.D. 524, 530 (C.D. Cal. 2011):

12 District courts in California routinely hold that the issue of whether a class
 13 representative may be allowed to present claims on behalf of others who
 14 have similar, but not identical, interests depends not on standing, but on an
 15 assessment of typicality and adequacy of representation.” (internal quotation
 16 marks and citations omitted) . . . Treatises and other circuits reach the same
 17 conclusion.

18 *See also Koh v. S.C. Johnson & Son, Inc.*, C-09-00927 RMW, 2010 WL 94265, at *3
 19 (N.D. Cal. Jan. 6, 2010) (refusing to consider scope of class until Rule 23 briefing, and
 20 holding “there is no brightline rule that different product lines cannot be covered by a
 21 single class”); *see also Koehler v. Litehouse, Inc.*, CV 12-04055 SI, 2012 WL 6217635,

22 ³ The cases Defendants cite (Mot. 7:15-22) further support this point. *See Pirozzi v.*
 23 *Apple Inc.*, 913 F. Supp. 2d 840, 846-847 (N.D. Cal. Dec. 20, 2012) (“Plaintiff fails to
 24 allege specifically which statements she found material to her decision to purchase . . .
 25 [and] [b]ased on the failure to allege these facts, Plaintiff has not suffered an injury-in-
 26 fact that is caused by the complained of conduct.”). Here, Plaintiff alleged which
 27 statements he relied on, that they were material to his purchase, causing him economic
 28 harm. ¶¶ 25-26, 52, 57, 60, 123, 133, 138. In *Boysen v. Walgreen Co.*, C 11-06262 SI,
 2012 WL 2953069, at *4 (N.D. Cal. July 19, 2012), the plaintiffs did not rely on any
 statement that the fruit juice did not contain a harmful chemical, which is wholly unlike
 the facts in this case. *See* ¶ 26.

1 at *5 (N.D. Cal. Dec. 13, 2012) (holding that “treatises and the vast majority of
 2 persuasive authority indicate that ... the issue of whether a class representative may be
 3 allowed to present claims on behalf of others who have similar, but not identical, interests
 4 depends not on standing, but on an assessment of typicality and adequacy of
 5 representation.”). Accordingly, while Defendants frame the issue as one of standing, it is
 6 in fact a Rule 23 issue and should not be decided until typicality and adequacy are briefed
 7 for this Court. *See id.*; *Bruno*, 280 F.R.D. at 530; *Koh*, 2010 WL 94265, at *3.⁴

8 Here, Plaintiff is challenging a male sexual enhancement product known as
 9 RockHard Weekend. ¶ 15. Although Defendants have modified the Product’s formula
 10 slightly over the years, the overall message of Defendants’ label advertising is still the
 11 same—that the Product will enhance male sexual performance. ¶¶ 16, 21-22.
 12 Specifically, versions of the Product’s packaging and/or labeling share the following
 13 claims: “RockHard Weekend” and “Sexual Performance Enhancer for Men,” “Sexual
 14

15 ⁴ Even if the Court were to consider the issue prematurely, under the misnomer of
 16 standing, “[t]he majority of the courts that have carefully analyzed the question hold that
 17 a plaintiff may have standing to assert claims for unnamed class members based on
 18 products he or she did not purchase so long as the products and alleged
 19 misrepresentations are substantially similar [to those purchased].” *Kane v. Chobani, Inc.*,
 20 No. 12-2425, 2013 WL 5289253, at *10 (N.D. Cal. Sept. 19, 2013) (citing *Miller*, 912 F.
 21 Supp. 2d at 869 (listing cases)); *see also Koh*, 2010 WL 94265, at *3. Factors courts
 22 consider, at the class certification stage, are: “[1] whether the challenged products are of
 23 the same kind, [2] whether they are comprised of largely the same ingredients, and [3]
 24 whether each of the challenged products bears the same alleged mislabeling.” *Colucci v.
 25 ZonePerfect Nutrition Co.*, 12-2907-SC, 2012 WL 6737800, at *4 (N.D. Cal. Dec. 28,
 26 2012). Many courts have found substantial similarities among challenged products that
 27 make uniform labeling claims, but contain different ingredients. *See id.* (holding
 28 substantial similarities existed between nutrition bars where six of nine challenged
 ingredients appeared in all nutrition bars at issue, and all the products bore the same “All-
 Natural” label); *Astiana v. Dreyer’s Grand Ice Cream, Inc.*, No. 11-2910, 2012 WL
 2990766, at *11-13 (N.D. Cal. 2012) (finding challenged ice cream products substantially
 similar because even though products had different ingredients, plaintiffs were
 challenging the same basic mislabeling practice across different product flavors);
Anderson v. Jamba Juice Co., 888 F. Supp. 2d 1000, 1006 (N.D. Cal. 2012) (plaintiff had
 standing to bring claims regarding other smoothie kit flavor purchasers because “same
 alleged misrepresentation was on all of the smoothie kit[s] regardless of flavor”).

1 Performance Pill for Men" or "the 72-Hour Sexual Performance Pill for Men." *See ¶¶*
 2 22, 26 & Ex. A. In addition, several iterations of the Product contain overlapping
 3 ingredients, such as Horny Goat Weed, Korean Ginseng, and Maca Root Extract. SAC,
 4 Ex. B. Thus, at the appropriate time, Plaintiff could establish typicality and adequacy
 5 under Rule 23 to represent purchasers of other products because he is challenging the
 6 same bases of misrepresentation – efficacy and unlawful aphrodisiac allegations for male
 7 sexual enhancement products. *See Astiana*, 2012 WL 2990766, at *11-13; *Colucci*, 2012
 8 WL 6737800, at *4; *Koh*, 2010 WL 94265, at *3; *Kane*, 2013 WL 5289253, at *10. But
 9 the time to decide this issue is not during a Rule 12 motion, but on Rule 23 briefing. *See*
 10 *Bruno*, 280 F.R.D. at 530; *Koh*, 2010 WL 94265, at *3.

11 **C. The Challenged Marketing Claims Are Not Puffery**

12 Defendants contend RHW's advertising constituted puffery, for which it may not
 13 be held liable. But Defendants are mistaken. As a threshold matter, Defendants' puffery
 14 arguments are misplaced. Consumer protection statutes such as the CLRA, UCL and
 15 FAL do not look to whether a statement is opinion, puffery, or prediction of future
 16 events, because the claims are not based on reliance on specific representations alleged to
 17 be false, but instead on the allegedly deceptive effect on consumers that results from a
 18 defendant's marketing. *See Kwikset Corp.*, 51 Cal. 4th at 328 ("Simply stated: labels
 19 matter. The marketing industry is based on the premise that labels matter, that consumers
 20 will choose one product over another similar product based on its label and various
 21 tangible and intangible qualities they may come to associate with a particular source.").
 22 In *Kwikset*, the defendant claimed it did not matter that their locks said "Made in the
 23 USA" because no one could have relied on that fact when purchasing a lock. In other
 24 words, a lock is still a lock, no matter where it is made. The California Supreme Court
 25 disagreed, noting that statutory consumer protection claims, such as the CLRA and UCL,
 26 do not concern themselves with a consumer's reliance on a particular claim, but instead
 27 focus on the effect to the general public, including a defendant's competitors, that results
 28 from false or misleading marketing claims. *Id.*

1 *i. Puffery must be analyzed as a whole, and the Court should not parse RHW's*
 2 *overall advertising claims into stand-alone phrases*

3 In reviewing advertising claims for puffery, the Court must look at all of the
 4 advertising claims as a whole, not singled out phrases, and must consider all of the
 5 statements in context with other statements on the package.⁵ *Cook, Perkiss & Liehe, Inc.*
 6 *v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 245 (9th Cir. 1990); *Southland Sod Farms*
 7 *v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997) (“When evaluating whether an
 8 advertising claim is literally false, the claim must always be analyzed in its full
 9 context.”); *Cuisinarts, Inc. v. Robot-Coupe Int'l Corp.*, No. 81 CIV 731(CSH), 1982 WL
 10 121559, *2 (S.D.N.Y. June 9, 1982) (“[I]n determining facial falsity the court must view
 11 the face of the statement in its entirety, rather than examining the eyes, nose, and mouth
 12 separately and in isolation from each other.”).

13 This is particularly true in the context of food or drug advertising under the laws
 14 applicable to these types of products. Under the Sherman Law, “[i]n determining
 15 whether the labeling or advertisement of a food, drug, device, or cosmetic is misleading,
 16 *all representations* made or suggested by the statement, word, design, device, sound, or
 17 any combination of these, shall be taken into account.” Cal. Health & Safety Code §
 18 110290; ¶ 49-51. The Court should therefore reject Defendants’ attempt to have their
 19 Product’s advertising claims weighed individually. *See* Mot. 11:16-18 (singling out
 20 advertising claims and omitting others, including express and implied advertising as
 21 noted, *e.g.*, at ¶¶ 33, 37, 38).

22 *ii. The challenged advertising, taken together and in context, is not sales puffing*

23 Even if a puffery defense was appropriate for Plaintiff’s statutory claims,
 24 Defendants’ advertising does not consist of puffery. Puffery is sales hyperbole that is

25 ⁵ The case law cited by Defendants in their Motion further supports this point. *See*
 26 *Delacruz v. Cytosport, Inc.*, C 11-3532 CW, 2012 WL 1215243, at *7 (N.D. Cal. Apr. 11,
 27 2012) (looking at “ideal” packaging claim in context with other claims, as a whole); *K &*
 28 *N Eng'g, Inc. v. Spectre Performance*, EDCV 09-01900-VAP, 2011 WL 4387094, at *15
 28 (C.D. Cal. Sept. 20, 2011) (same).

1 generalized rather than specific, and so outrageous or exaggerated that no consumer
 2 could assert they reasonably relied on it. *Cook, Perkiss & Liehe, Inc.*, 911 F.2d at 246;
 3 *Williams*, 523 F.3d at 939, n.3. A statement is mere puffery where it is “extremely
 4 unlikely to induce consumer reliance.” *Newcal Indus. v. Ikon Office Solution*, 513 F.3d
 5 1038, 1053 (9th Cir. 2008) (emphasis added). A claim of product superiority might
 6 constitute nonactionable puffery if it is “vague or highly subjective,” but “misdescriptions
 7 of specific or absolute characteristics of a product are actionable.” *Southland Sod Farms*,
 8 108 F.3d at 1145 (citations omitted). Even if a word, by itself, might be considered
 9 puffery, the relevant inquiry is whether it contributes to the deceptive marketing message
 10 as a whole. *See In re Ferrero Litig.*, 794 F. Supp. 2d 1107, 1115-1116 (S.D. Cal. 2011);
 11 *see also Am. Home Prods. Corp. v. F.T.C.*, 695 F.2d 681, 687 (3d Cir. 1982) (“The
 12 impression created by the advertising, not its literal truth or falsity, is the desideratum.”).

13 Here, Defendants’ challenged advertising is based on specific absolute
 14 characteristics of the Product that are both objective and verifiable when construed as a
 15 whole. For example, objective empirical criteria can be used to confirm whether RHW
 16 is, in fact, a “Sexual Performance Enhancer for Men” that provides “Fast” and
 17 “Effective” “RockHard Results” for consumers. ¶¶ 33, 37-38. In addition, Defendants
 18 represent to the public other absolute characteristics of RHW, i.e., that it is a legal dietary
 19 supplement for “sexual performance enhance[ment],” but this and related sales claims are
 20 “misdescriptions” of the Product because the Product may not be sold for that intended
 21 use. *Southland Sod Farms*, 108 F.3d at 1145; 21 C.F.R. § 310.528 (stating that labeling
 22 claims for aphrodisiacs for OTC use are either false, misleading, or unsupported by
 23 scientific data); ¶¶ 43-47. In a case directly on point to this one, factually, the Southern
 24 District of California found that the Product name, “Cobra Sexual Energy,” and labeling
 25 claim, “‘aphrodisiac’ plants to **enhance** . . . sexual energy,” among others, were not
 26 puffery. *See Peviani v. Natural Balance, Inc.*, 774 F. Supp. 2d 1066, 1072 (S.D. Cal.
 27
 28

1 2011) (emphasis added). The Court here should similarly deny Defendants' Motion on
 2 the puffery defense.⁶

3 None of Defendants' case law holds otherwise, but deals instead with clearly
 4 untenable consumer allegations where any consumer's reliance on particular product
 5 statements was unreasonable.⁷ "Sexual performance enhancer" and guarantees of "fast,"

6 Indeed, much less specific representations reflecting cause and effect are actionable.
 7 See *Pizza Hut, Inc. v. Papa John's Int'l, Inc.*, 227 F.3d 489, 501-02 (5th Cir. 2000)
 8 ("Better Pizza" actionable because tied to "Better Ingredients"). See also *Autodesk, Inc.*
 9 v. *Dassault Sys. Solidworks Corp.*, 685 F. Supp. 2d 1001, 1017-18 (N.D. Cal. 2009)
 10 (phrase, "work easily," while subjective and not measurable in isolation, when viewed in
 11 context—that defendant's computer program can work easily with any version of
 12 software—is not puffery); *Dyson, Inc. v. Oreck Corp.*, No. 07-9633, 2009 U.S. Dist.
 13 LEXIS 19097, *20-*21 (E.D. La. Mar. 4, 2009) ("while the word 'bulky' may be puffery
 14 standing alone ... [i]n context the claim is that the Dyson, in contrast to the slimmer
 15 Oreck, is too large (i.e., bulky) to clean under furniture of a certain height"); *Clorox Co.*
 16 *P.R. v. P&G*, 228 F.3d 24, 38-39 (1st Cir. 2000) (a campaign tag line of "Whiter is not
 17 possible," in context, is not puffing); *Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939, 945-46
 18 (3d Cir. 1993) (Pennzoil's claim of "better engine protection" was not puffery because it
 19 involves "more than a mere generality"). Here, RHW advertises itself as having
 20 scientifically-chosen herbs to enhance a male erection. See SAC, Ex. A. Therefore, its
 21 advertising is capable, like these cases, of objective verification.

7 For example, *Haskell v. Time, Inc.*, 857 F. Supp. 1392, 1399-1400 (E.D. Cal. 1994)
 19 involved sweepstakes advertising that no person would take as meaning one did not have
 20 to enter the sweepstakes to win. Similarly, *Fisher v. Monster Beverage Corp.*, EDCV 12-
 21 02188-VAP, 2013 WL 4804385, at * 12-13 (C.D. Cal. July 9, 2013), only challenged
 22 puffery in the context of express warranty and not the CLRA, UCL or FAL. See also
 23 *Baltazar v. Apple, Inc.*, CV-10-3231-JF, 2011 WL 3795013 at * 4 (N.D. Cal. Aug. 26,
 24 2011) (statement that iPad can be used "just like a book" is puffery); *Cook, Perkiss &*
 25 *Liehe, Inc.*, 911 F.2d at 246 ("Here, the implication of the advertisement is an
 26 exaggerated claim that defendants' costs are lower than any competing attorney's. It is
 27 beyond the realm of reason"); *In re Sony Grand Wega KDF-E A10/A20 Series Rear*
 28 *Projection HDTV Tel. Litig.*, 758 F. Supp. 2d 1077, 1089 (S.D. Cal. 2010) (television's
 "high" or "superior" quality could not be likely to deceive a reasonable consumer
 because plaintiffs alleged TVs stopped rendering quality image only after expiration of
 the warranty period); *Consumer Advocates v. Echostar Satellite Corp.*, 113 Cal. App. 4th
 1351, 1361 (2003) ("Crystal clear" and "CD quality" were non-actionable because they

1 “effective” “results” are not the same as the “perfect” claims in the cases Defendants cite.
 2 Instead, in a case directly on-point, similar claims were found to be non-actionable
 3 puffery. *Peviani*, 774 F. Supp. 2d at 1072. The Court should follow *Peviani*’s sound
 4 reasoning. *Id.* (“[T]he Court concludes that is not the ‘rare situation’ where the issue
 5 should be decided on a motion to dismiss, and the Court declines to dismiss these
 6 statements as puffery. . . . while the other statements relied on by Plaintiff standing on
 7 their own may constitute puffery, those statements contribute ‘to the deceptive context of
 8 the packaging as a whole.’ . . . Given their context, the Court declines to dismiss these
 9 statements as well.”) (citing *Williams*, 552 F.3d at 939–40, n.3).

10 **D. The Phrase “All-Natural” is Actionable**

11 Claims under the UCL, FAL and CLRA are governed by the “reasonable
 12 consumer” test. *Williams*, 552 F.3d at 938 (internal quotations and citations omitted).
 13 Under the reasonable consumer standard, a plaintiff must “show that members of the
 14 public are likely to be deceived.” *Id.* “The California Supreme Court has recognized that
 15 these laws prohibit not only advertising which is false, but also advertising which,
 16 although true, is either actually misleading or which has a capacity, likelihood or
 17 tendency to deceive or confuse the public. *Id.* “It is true that ‘the primary evidence in a
 18 false advertising case is the advertising itself.’” *Id.* at 939–939 (citing *Brockey v. Moore*,
 19 107 Cal. App. 4th 86, 100 (2003)). “California courts, however, have recognized that
 20 whether a business practice is deceptive will usually be a question of fact not appropriate
 21 for decision on demurrer.” *Id.* (citing *Linear Tech. Corp. v. Applied Materials, Inc.*, 152
 22 Cal. App. 4th 115, 134–35 (2007) (“Whether a practice is deceptive, fraudulent, or unfair

23
 24 could not be reasonably understood as promise of perfection); *Stearns v. Select Comfort*
 25 *Retail Corp.*, 08-2746 JF, 2009 WL 1635931, at *11 (N.D. Cal. June 5, 2009) (“perfect
 26 night’s sleep” amounts to non-actionable puffery because “[n]o reasonable consumer
 27 would believe that a Sleep Number® bed miraculously would deliver the elusive ‘perfect
 28 night’s sleep.’”); *Stickrath v. Globalstar, Inc.*, 527 F. Supp. 2d 992, 999 (N.D. Cal. 2007)
 (“high quality” and ‘reliable’ service’ . . . are non-actionable puffery that would not be
 likely to mislead a reasonable consumer.”).

1 is generally a question of fact which requires ‘consideration and weighing of evidence
 2 from both sides’ and which usually cannot be made on demurrer.”) (internal quotations
 3 omitted)). Dismissal is only appropriate in rare cases where the accused label itself
 4 makes it impossible for the plaintiff to prove that a reasonable consumer is likely to be
 5 deceived. *Gitson v. Trader Joe’s Co.*, 13-CV-01333-WHO, 2013 WL 5513711, at * 7
 6 (N.D. Cal. Oct. 4, 2013) (citing *Williams*, 552 F. 3d at 939).

7 Defendants claim the phrase “all-natural” cannot be deceptive to a reasonable
 8 consumer. Mot. at 13:4-8. In support of this proposition, Defendants heavily rely on
 9 *Pelayo v. Nestle USA*, 989 F. Supp. 2d 973 (C.D. Cal. 2013). But Defendants’ reliance is
 10 misplaced because *Pelayo* held that no reasonable consumer would rely on the phrase “all
 11 natural” within the context of the specific product label at issue, not that the phrase “all
 12 natural” was never actionable. *See Pelayo*, 989 F. Supp. 2d at 978-79 (Plaintiff could not
 13 state a claim under the CLRA or UCL regarding Defendants’ “All Natural” labeling of
 14 Buitoni Pastas because she failed to offer an objective or plausible definition of the
 15 phrase “All Natural,” and finding use of “All Natural” is not deceptive in context of mass
 16 produced pasta products).⁸ Aside from a blanket referral to this authority, Defendants
 17 point to no evidence that indicates it will be impossible for Plaintiff to prove a reasonable
 18 consumer would likely be deceived by RHW’s “All Natural” representations, whereas
 19 Plaintiff points out several reasons why the claim is false or deceptive. ¶¶ 35-36.

20 Further, Defendants’ argument that RHW’s “detailed” ingredient list would resolve
 21 ambiguities regarding the Product’s purportedly “All Natural” ingredients is contrary to
 22 law and without merit. Mot. at 13:13-15. Reasonable consumers are not expected to
 23 look beyond misleading representations on the front of the box to discover the truth from

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⁸ The court in *Hairston v. S. Beach Beverage Co., Inc.*, CV 12-1429-JFW DTBX, 2012
 WL 1893818, at *3-4 (C.D. Cal. May 18, 2012), reached a similar conclusion, holding
 that while plaintiff’s “all natural” claim was actionable, federal law preempted use of
 fruit names to describe beverages, as well as “all natural” labeling because of products’
 FDA-compliant use of fruit names. Here, Plaintiff claims RHW is not FDA compliant.
 ¶¶ 43-47.

1 the ingredient list in small print on the side of the box. *Williams*, 552 F.3d at 939. Nor is
 2 it permissible for manufacturers to make misleading label statements, then rely on the
 3 ingredient list to correct those misinterpretations and provide a shield for liability for the
 4 deception. *Id.*

5 The lower Circuit authority Defendants cite do nothing to bolster their contention.
 6 In *Rooney v. Cumberland Packing Corp.*, 12-CV-0033-H DHB, 2012 WL 1512106, at *4
 7 (S.D. Cal. Apr. 16, 2012), the plaintiff “allege[d] that the use of the phrase ‘in the raw’
 8 misled her . . . into believing the product was . . . unprocessed, and unrefined.” But sugar
 9 has to be processed to be produced, and thus Rooney’s interpretation was unreasonable.
 10 *Id.* Further, Defendants do not allege how any of the labeling claims here are similar to
 11 “in the raw.” *Id.* *Morgan v. Wallaby Yogurt Co., Inc.*, 13-CV-00296-WHO, 2013 WL
 12 5514563, at *8 (N.D. Cal. Oct. 4, 2013) is not even about puffery. And, there were no
 13 front-of-pack claims about the level of sugar in the product; instead, the amount and type
 14 of sugar was only listed in the ingredient list. *Id.* (finding that *Williams*, 552 F.3d at 939,
 15 was not implicated because “the ‘truth’ [about the amount of sugar] is literally next to the
 16 allegedly misleading representation in the same print size”). *Gitson*, 2013 WL 5513711,
 17 at *7, was also not a puffery case, and the court found it was unreasonable to allege any
 18 consumer would believe soy milk was cow’s milk or had the same qualities as cow’s
 19 milk. These cases bear no factual similarity to the front-of-pack claims at issue here.

20 *Viggiano v. Hansen Natural Corp.*, 944 F. Supp. 2d 877, 892, 894, 896-897 (C.D.
 21 Cal. 2013) concerned preemption for fruit flavors in drinks, which is not at issue here;
 22 and the court found “all natural” could not be the basis of warranty claims because
 23 “Viggiano does not identify any artificial flavor in the drink.” But, Plaintiff here asserts
 24 what is non-natural about RHW, ¶¶ 35-36, and carefully did not include “all natural” for
 25 his MMWA claims, ¶ 161. The court in *Kane*, 2013 WL 5289253, at *2, 10, did not
 26 dismiss the “all natural” claims as being non-actionable puffery; it dismissed because the
 27 only basis for the claims was fruit coloring in yogurt, but this was disclosed on the
 28

1 packaging; fruit coloring is allowed by the FDCA; and the plaintiff failed to plead
 2 reliance. This case, too, is wholly inapposite to the circumstances here. *See ¶¶ 35-36, 55.*

3 **E. The Complaint Alleges False Advertising, Not Lack of Substantiation**

4 Defendants claim this case is about lack of substantiation, conveniently miscasting
 5 Plaintiff's claims as something they are not. First, it is Defendants, not Plaintiff, who
 6 make the establishment and endorsement claims that RHW is "Doctor Tested" and
 7 "Doctor Approved." *See ¶¶ 22, 26, 34, 39-42 & Ex. A.* The SAC challenges the veracity
 8 of Defendants' establishment and endorsement claims, which is permissible. *See id.*;
 9 *Rikos v. Proctor & Gamble Co.*, 782 F. Supp. 2d 522, 527, 529 (S.D. Ohio 2011)
 10 (applying California law, and finding where defendant advertised its products as
 11 "clinically proven," the complaint did not allege "lack of substantiation" but was brought
 12 on grounds of actual falsity or deception as to this representation); *Hansen Beverage Co.*
 13 *v. Vital Pharm., Inc.*, No. 08-CV-1545-IEG (POR), 2010 WL 1734960, at *4 (S.D. Cal.
 14 Apr. 27, 2010) (providing overview of establishment claims and listing cases); *F.T.C. v.*
 15 *Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 298-299 (D. Mass. 2008); *Rexall*
 16 *Sundown, Inc. v. Perrigo Co.*, 651 F.Supp.2d 9, 35 (E.D.N.Y. 2009). If Defendants'
 17 endorsement and establishment claims are untrue, then Plaintiff may prove these
 18 statements are actually false. *See Rikos*, 782 F. Supp. 2d at 527, 529. Thus, Defendants'
 19 categorization of these allegations as "substantiation" claims is misguided.

20 Second, the SAC alleges false and deceptive advertising under the UCL, FAL and
 21 CLRA. *See, e.g.*, ¶¶ 113-142. Even if the SAC could be inferred as solely consisting of a
 22 lack of substantiation claim, which it does not, Defendants exaggerate the case law on
 23 this issue. Lack of substantiation is a cognizable theory of relief under California law
 24 that requires the plaintiff to prove actual falsity of the advertising. *See Nat'l Council*
 25 *Against Health Fraud, Inc. v. King Bio Pharm., Inc.*, 107 Cal. App. 4th 1336, 1344
 26 (2003). Contrary to Defendants' contention, *National Council* did not hold that lack of
 27 substantiation is not a valid theory of relief. Rather, *National Council* held the burden of
 28 proof does not shift to defendant when private plaintiffs sue solely on the grounds that a

1 manufacturer lacks substantiation for its advertising claims. *Id.* This interpretation is
 2 evidenced by the fact that plaintiffs in *National Council* went to trial and, at trial, plaintiff
 3 presented no evidence of actual falsity and lost on a directed verdict. *See id.* at 1347.

4 The SAC alleges RHW's "Doctor Tested; Doctor Approved" claims are "false and
 5 deceptive because a reasonable consumer is likely to believe the Product is used,
 6 endorsed, or recommended by doctors practicing medicine in clinical settings, which
 7 promotes consumer confusion and lends unwarranted legitimacy to the Product . . . [and]
 8 Defendants have not and cannot cite any research studies or unsolicited endorsements of
 9 RHW by medical doctors[.] [N]or is RHW used in clinical settings for the treatment of
 10 male impotence or any other condition." ¶¶ 39-42.⁹ At trial, Plaintiff can prove RHW's
 11 advertising is false by scientific literature, FDA and FTC standards, and expert testimony,
 12 which is permissible. *See Nat'l Council*, 107 Cal. App. 4th at 1347 (noting falsity can be
 13 "established by testing, scientific literature, or anecdotal evidence").

14 **F. The SAC Alleges Defendants Engaged in Unfair Conduct**

15 "The California Supreme Court has not established a definitive test to determine
 16 whether a business practice is 'unfair' in consumer cases. *Bias v. Wells Fargo & Co.*,
 17 942 F. Supp. 2d 915, 933 (N.D. Cal. 2013) (citing *Davis v. Ford Motor Credit Co.*, 179
 18 Cal. App. 4th 581, 594–98 (2009) and *Harmon v. Hilton Group*, No. C-11-03677 JCS,
 19 2011 WL 5914004, at *8 (N.D. Cal. Nov. 28, 2011)); *see also Davis v. HSBC Bank*
 20 *Nevada*, N.A., 691 F.3d 1152, 1169 (9th Cir. 2012) ("The UCL does not define the term
 21 'unfair]. . . [and the] proper definition of 'unfair' conduct against consumers 'is currently

22
 23 ⁹ Defendants claim the SAC contradicts itself on these allegations by naming Dr. John R.
 24 Miklos as a defendant, but the parties stipulated to Dr. Miklos' dismissal. Dkt. # 33. The
 25 fact that an owner of the company may have lent his own credentials to the Product does
 26 not mean the claims are not false or misleading. Discovery has not yet opened but the
 27 relevant FTC standard requires disclosure if the endorser, if it is Miklos, has a connection
 28 to the product. *See* www.ftc.gov/news-events/media-resources/truth-advertising/advertisement-endorsements ("The Endorsement Guides also state that if there is a connection between the endorser and the marketer of a product that would affect how people evaluate the endorsement, it should be disclosed.").

1 in flux' among California courts.") (internal citations omitted). "Three tests for unfairness
 2 exist in the consumer context." *Id.* "Under the first test, a business practice is unfair
 3 where the practice implicates a public policy that is 'tethered to specific constitutional,
 4 statutory, or regulatory provisions.'" *Id.* (citing *Harmon*, 2011 WL 5914004, at *8).
 5 "The second test 'determine[s] whether the alleged business practice is immoral,
 6 unethical, oppressive, unscrupulous, or substantially injurious to consumers and requires
 7 the court to weigh the utility of the defendant's conduct against the gravity of the harm to
 8 the alleged victim.'" *Id.* (citing *Harmon*, 2011 WL 5914004, at *8). "Under the third
 9 test, 'unfair' conduct requires that: '(1) the consumer injury must be substantial; (2) the
 10 injury must not be outweighed by any countervailing benefits to consumers or
 11 competition; and (3) it must be an injury that consumers themselves could not reasonably
 12 have avoided.'" *Id.* (citing *Harmon*, 2011 WL 5914004, at *8) (internal citations
 13 omitted). "Regardless of which prong is at issue, '[w]hether a business act or practice
 14 constitutes unfair competition with Section 17200 is a question of fact.'" *Nat'l Rural
 15 Telecomm. Co-op. v. DIRECTV, Inc.*, 319 F. Supp. 2d 1059, 1074 (C.D. Cal. 2003)
 16 (internal citations omitted).

17 Here, the SAC alleges sufficient facts that show Defendants' conduct plausibly
 18 violates the UCL's "unfair" prong. First, Plaintiff alleges Defendants' advertising,
 19 promotion and sale of RHW is against public policy by violating federal and state law (21
 20 U.S.C. § 352; 21 C.F.R. § 310.528; Cal. Health & Safety Code §§ 110100, 110105,
 21 110110, 110111) because the Product is an unlawful over-the-counter aphrodisiac, as
 22 evidenced by the claims on its packaging and labeling. ¶¶43-61. Second, the utility of
 23 the defendant's conduct is nil because the FDA has stated over-the-counter aphrodisiacs
 24 are ineffective and unsafe for consumer use, and this conduct cannot possibly outweigh
 25 the gravity of harm to consumers because Defendants are continuing to sell an illegally
 26 marketed good that is ineffective and unsafe. *See* 21 C.F.R. § 310.528; ¶ 47. Third,
 27 Defendants' marketing, promotion and sale of RHW as an unlawful aphrodisiac is
 28 substantially injurious to Plaintiff and the Class because, if left uncorrected, Plaintiff and

1 consumers will continue to be exposed to the Product's false, deceptive and unlawful
 2 advertising claims every time they visit retail stores, thus negating any countervailing
 3 benefits from Defendants' conduct. ¶ 64. Moreover, Plaintiff and the Class could not
 4 have avoided purchasing an illegally marketed Product because of the misrepresentations
 5 contained on RHW's packaging and labeling, which Defendants were under a duty to
 6 disclose and failed to do so. ¶¶ 58-68. Accordingly, the SAC contains sufficient facts to
 7 support the "unfairness" of Defendants' conduct under the UCL.

8 **G. The Cited FDCA Regulations Apply to RHW**

9 Defendants contend RHW is not a "drug" within the meaning of the FDCA
 10 because "[n]one of the statements on [RHW's] packaging suggest that the product will
 11 diagnose, cure, mitigate, treat, or prevent a disease." Mot. at 16:20-25. But what the
 12 Product's packaging suggests is a question of fact under a reasonable consumer standard
 13 that cannot be resolved here. The SAC alleges RHW's labeling claims and packaging
 14 graphics evidence Defendants' intended use of the Product as an aphrodisiac. ¶ 43.
 15 Specifically, Defendants market RHW as a "Sexual Performance Enhancer for Men,"
 16 which portrays the message that RHW will arouse or increase consumers' sexual desire
 17 and/or improve their sexual performance if taken as directed. ¶ 43.

18 The regulatory classification of a product under the FDCA is determined by its
 19 intended use, as demonstrated by, among other things, its labeling and advertising, the
 20 circumstances of its marketing, sale and use, and the manufacturer's knowledge that a
 21 product is being used for a purpose for which it is neither labeled nor advertised. 21
 22 C.F.R. § 201.128. Further, under 21 C.F.R. § 310.528, any OTC good that is labeled,
 23 represented, or promoted for use as an aphrodisiac, like RHW, is regarded as a "new
 24 drug" within the meaning of section 201(p) of the FDCA (located at 21 U.S.C. § 355(p)).
 25 ¶ 44. The FDCA requires any new drug to have an application approved by the FDA
 26 before the drug can be marketed to the public, and that the drug's label be approved by
 27 the FDA prior to marketing or selling it to the public. *See generally, id.*; 21 U.S.C. §§
 28 355(a), (b), (j); *see also* ¶ 45. RHW violates the FDCA because the adequacy of the

1 labeled directions for its “aphrodisiac” uses has not been approved by the FDA prior to
 2 RHW being marketed to the public. *See* 21 U.S.C. § 355(a); ¶ 46. Accordingly, the
 3 Product is misbranded. *Id.*

4 Further, as to all of the ingredients in any iteration of RHW, there is a lack of
 5 adequate data to establish general recognition of the safety and effectiveness of any of
 6 these ingredients, or any other ingredient, for OTC use as an aphrodisiac. 21 C.F.R. §
 7 310.528; *see also* ¶ 47. Labeling claims for aphrodisiacs for OTC use are either false,
 8 misleading, or unsupported by scientific data. *Id.* Thus, based on the evidence currently
 9 available, any OTC drug product containing ingredients for use as an aphrodisiac,
 10 including RHW, cannot be generally recognized as safe and effective. *See id.*

11 Defendants’ argument that 21 C.F.R. § 310.528 precludes aphrodisiac labeling
 12 claims for dietary supplements is misguided (Mot. at 16:20-25), as it completely ignores
 13 the fact that the Product’s labeling and advertising, as well as the circumstances of its
 14 marketing and sale, evidence its intended use as an aphrodisiac, which is prohibited, no
 15 matter what form the good takes. *See* 21 C.F.R. § 201.128 (intended use derives from
 16 package claims). Indeed, Defendants actually admit in their moving papers that “some
 17 of the claims on the Rockhard package may suggest that the [P]roduct will increase
 18 sexual vigor and performance” (Mot. at 16:23-24), which shows their knowledge of the
 19 Product’s intended use as an aphrodisiac.

20 And, false or misleading labeling claims are prohibited under the FDCA for diet
 21 supplements. 21 U.S.C. § 343(r)(6)(B)). So, even if RHW were a dietary supplement,
 22 its labeling claims may not be “false or misleading,” which would cause it to be
 23 misbranded. *Id.* Thus, a jury could find that Defendants promote RHW for conditions
 24 that cause the Product to be misbranded, which is the same as being an unlawful new
 25 drug under the FDCA. *See id.*; ¶¶ 32-70.

26 **H. Plaintiff’s Express and Implied Warranty Claims are Adequately Pled**

27 Defendant challenges Plaintiff’s breach of express warranty claims on puffery
 28 grounds, which, as discussed *supra*, are inapplicable to the labeling claims at issue in this

1 litigation. Defendants further allege Plaintiff failed to give them timely notice of their
 2 breach of express and implied warranties because Plaintiff purchased the Product in 2011
 3 and did not notify Defendants of the alleged breach until 2013. Mot. at 18:14-17.
 4 Defendants' argument, however, is without merit because the statutory notice
 5 requirement for breach of warranty "is excused as to a manufacturer with which the
 6 purchaser did not deal." *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales*
 7 *Practices & Prods. Liab. Litig.*, 754 F. Supp. 2d 1145, 1180 (C.D. Cal. 2010) (citing
 8 *Greenman v. Yuba Power Prods.*, 59 Cal. 2d 57, 61 (1963)). The principle enunciated by
 9 the California Supreme Court in *Greenman* has been recently applied by federal district
 10 courts. *See, e.g., id.; Aaronson v. Vital Pharms., Inc.*, 09-CV-1333 W (CAB), 2010 WL
 11 625337, at *5 (S.D. Cal. Feb. 17, 2010) (denying motion to dismiss for failure to give
 12 Cal. Com. Code § 2607(3)(A) notice).

13 Because Plaintiff's warranty claims are grounded in California state law (see ¶¶
 14 143-153), Plaintiff was not required to notify Defendants before filing suit because
 15 Plaintiff did not deal directly with Defendants in purchasing the Product. Rather,
 16 Plaintiff purchased the Product at B&B Liquor, in Los Angeles, California during the
 17 Class Period. *See ¶ 25.* As such, the contention that Plaintiff's breach of warranty notice
 18 was deficient is unsound. Even if the foregoing were not true, Plaintiff sent a CLRA
 19 warning letter to Defendants on August 21, 2013, before this action commenced. SAC,
 20 Ex. E at p. 13. Thus Plaintiff has satisfied any requisite notice requirements because any
 21 additional notice may be satisfied after filing of the SAC and does not warrant dismissal.
 22 *See In re Toyota*, 754 F. Supp. 2d at 1180 ("post-filing notice [is acceptable for state
 23 warranty claims] if notice is otherwise [given] within a reasonable time, and Plaintiffs are
 24 granted leave to amend to allege such notice"); *Keegan v. Am. Honda Motor Co.*, 838 F.
 25 Supp. 2d 929, 950-51 (C.D. Cal. 2012).

26 **I. Plaintiff Adequately Pleaded his MMWA Claim**

27 The MMWA regulates warranties on consumer goods and directly applies to "a
 28 written affirmation which relates to the nature of the material or workmanship and

1 affirms or promises that such material or workmanship is defect free or will meet a
 2 specific level of performance over a specific period of time.” *Allen v. Hyland’s Inc.*, CV
 3 12-01150 DMG MANX, 2013 WL 1748408, at *4 (C.D. Cal. Apr. 11, 2013) (citing 15
 4 U.S.C. §§ 2302(a), 2301(6)(A)) (internal quotations and citations omitted). Statements
 5 regarding a product’s effectiveness constitute actionable warranty claims under the
 6 MMWA. *See id.* at *6 (“The promise here is not that the product will be completely
 7 effective for everyone, but that it will be at least somewhat effective for some people . . .
 8 [because] there is only one reason to purchase the homeopathic drug Products
 9 manufactured by Defendants, and that is for the effectiveness of the remedies.”).

10 The SAC alleges numerous efficacy claims for RHW, including, *inter alia*: “Fast
 11 & Effective,” “RockHard Results,” “Doctor Tested,” “Doctor Approved,” “Sexual
 12 Performance Enhancer for Men,” “Sexual Performance Pill for Men” and “The 72 Hour
 13 Sexual Performance Pill for Men.” ¶¶ 26, 33, 34-42 & Ex. A. All of these statements
 14 lend themselves to the purported effectiveness of RHW, which Plaintiff alleges does not
 15 work because “[n]one of the ingredients in any iteration of RHW . . . will enhance male
 16 sexual performance.” ¶¶ 31, 37, 38, 41. Thus, Plaintiff has sufficiently pleaded
 17 warranties in support of his MMWA claim.

18 Further, the SAC also “assert[s] state law warranty claims arising under the laws of
 19 the state of California, as allowed under the . . . MMWA.” ¶ 156; 15 U.S.C. § 2310(d)(1).
 20 A MMWA claim based upon borrowed state law claims is separate from a claim that
 21 originates under the MMWA. *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022
 22 n. 3 (9th Cir. 2008). Defendants’ moving papers raise no argument regarding Plaintiff’s
 23 state law warranty claims, other than purported lack of notice, which is addressed *supra*.
 24 Accordingly, Defendants have asserted no grounds to warrant dismissal of Plaintiff’s
 25 MMWA claims, under state law or independently under the MMWA.

26 **J. Allegations in the SAC Should Not be Stricken**

27 The court may “strike from a pleading an insufficient defense or any redundant,
 28 immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). The grounds for a

1 motion to strike must appear on the face of the complaint or from matter which the court
 2 may judicially notice. *Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128,
 3 1139 (N.D. Cal. 2010) (citing *SEC v. Sands*, 902 F. Supp. 1149, 1165 (C.D. Cal. 1995)
 4 and *Lazar v. Trans Union LLC*, 195 F.R.D. 665, 669 (C.D. Cal.2000)) (internal citations
 5 omitted). “The central function of a Rule 12(f) motion is ‘to avoid the expenditure of
 6 time and money that must arise from litigating spurious issues by dispensing with those
 7 issues prior to trial.’” *Id.* (internal citations omitted). “As with motions to dismiss, when
 8 ruling on a motion to strike, the Court takes the plaintiff’s allegations as true and must
 9 liberally construe the complaint in the light most favorable to the plaintiff.” *Id.* at 1140.

10 Defendants raise no spurious, “redundant, immaterial, impertinent, or scandalous
 11 matter” in the SAC. Fed. R. Civ. P. 12(f). And, for the reasons discussed *supra*, the
 12 Court should not strike allegations regarding (i) iterations of RHW Plaintiff did not
 13 purchase, which is a class issue; (ii) statements Defendants contend are non-actionable
 14 puffery, such as “all natural;” (iii) claims regarding the veracity of Defendants’
 15 establishment and endorsement representations; or (iv) allegations that RHW is an
 16 unlawful aphrodisiac, because all of these, when taken as true, do not violate Rule 12(f).

17 Defendants also urge this Court to strike the SAC’s Class definition to the extent it
 18 incorporates purchasers from states with laws similar to California. Mot. at 22:6-17.
 19 Whether a Court may apply state laws similar to California’s to the class, however,
 20 involves a detailed choice of law analysis, raised in a class certification motion. *See, e.g.*,
 21 *Mazza*, 666 F.3d at 589. But, “[a]t this stage of the instant litigation, a detailed choice-of-
 22 law analysis would be inappropriate. Since the parties have yet to develop a factual
 23 record, it is unclear whether applying different state consumer protection statutes could
 24 have a material impact on the viability of Plaintiffs’ claims.” *In re Clorox Consumer*
 25 *Litig.*, 894 F. Supp. 2d 1224, 1237 (N.D. Cal. 2012); *see also Won Kyung Hwang v. Ohso*
 26 *Clean, Inc.*, C-12-06355 JCS, 2013 WL 1632697, at * 21 (N.D. Cal. Apr. 16, 2013)
 27 (same); *Werdebaugh v. Blue Diamond Growers*, 12-CV-02724-LHK, 2013 WL 5487236,
 28 *16 (N.D. Cal. Oct. 2, 2013) (“Here, the Court finds that striking the nationwide class

1 allegations at this stage of this case would be premature."); *Clancy v. The Bromley Tea*
 2 *Co.*, 12-CV-03003-JST, 2013 WL 4081632, *7 (N.D. Cal. Aug. 9, 2013) (same);
 3 *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913, 923 (N.D. Cal. 2012) (same); *In re iPhone*
 4 *4S Consumer Litig.*, C 12-1127 CW, 2013 WL 3829653, *8 (N.D. Cal. July 23, 2013)
 5 (same).¹⁰

6 **K. Plaintiff is Not Required to Provide a More Definite Statement**

7 Federal Rule of Civil Procedure 12(e) allows a party to move for a more definite
 8 statement if a pleading is so vague and ambiguous that a party cannot reasonably be
 9 required to frame a response. Fed. R. Civ. P. 12(e). "A motion for more definite
 10 statement pursuant to Rule 12(e) attacks the unintelligibility of the complaint, not simply
 11 the mere lack of detail, and therefore, a court will deny the motion where the complaint is
 12 specific enough to apprise the defendant of the substance of the claim being asserted."
 13 *Beery v. Hitachi Home Elecs. (Am.), Inc.*, 157 F.R.D. 477, 480 (C.D. Cal. 1993) (citing
 14 *FRA S.p.A v. Surg-O-Flex of Am.*, 415 F. Supp. 421, 427 (S.D.N.Y. 1976)). "If the
 15 detail sought by a motion for more definite statement is obtainable through discovery, the
 16 motion should be denied." *Id.* (citing *Famolare, Inc. v. Edison Bros. Stores, Inc.*, 525 F.
 17 Supp. 940, 949 (E.D. Cal. 1981)).

18 Here, the SAC defines the Class as "[a]ll purchasers of the RockHard Weekend
 19 Product, in all iterations/variations, sizes and formulas, for personal or household use and
 20 not for resale, in California and other states with laws similar to California from August
 21 2009 to the present. ¶ 105. These allegations, although they may lack detail on
 22

23 ¹⁰ The only authority Defendants cite from this Circuit does nothing to undermine this
 24 point. *See Kamm v. Sugasawara*, 509 F.2d 205 (9th Cir. 1975) (dismissal of class action
 25 appropriate at motion to dismiss phase when plaintiffs' claims were previously
 26 adjudicated in prior class action lawsuit). *See also Zinser v. Accufix Research Inst., Inc.*,
 27 253 F.3d 1180 (9th Cir. 2001) (affirming denial of class certification after certification
 28 motion); *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68 (2010) (applying government
 interest test in summary judgment motion); *Edgar v. MITE Corp.*, 457 U.S. 624 (1982)
 (not a class action).

1 which states have laws similar to California, are not unintelligible. *See Beery*, 157 F.R.D.
2 at 480. Any additional information regarding the scope of the class will be obtained
3 through the discovery process. *See id.* None of Defendants' authority holds that a class
4 definition, in the absence of class certification brief, may be subject to the Rule 12(e)
5 standard. *See Mot.* 23:7-14. As such, Defendants' request for a more definite statement
6 should be denied.

7 **L. Leave to Amend Should be Permitted**

8 If a complaint is dismissed, or allegations stricken, leave to amend should be freely
9 granted because the policy of testing claims on the merits "should be applied with
10 "extreme liberality." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir.
11 1987); *Stearns*, 763 F. Supp. 2d at 1140. "Dismissal with prejudice and without leave to
12 amend is not appropriate unless it is clear ... that the complaint could not be saved by
13 amendment." *Eminence Capital, L.L.C. v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.
14 2003). For the reasons discussed *supra*, Defendants have articulated no legally
15 cognizable grounds that warrant this Court's denial of leave to amend. As such, this
16 Court should respectfully grant Plaintiff's leave to amend the SAC, if necessary.

17 **IV. CONCLUSION**

18 For the foregoing reasons, Plaintiff respectfully requests this Court deny
19 Defendants' Motion in its entirety, or, if necessary, grant leave to amend.

20 Dated: August 18, 2013

/s/ Ronald A. Marron _____

21 By: Ronald A. Marron

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